

Consolidated Appeals 1050625 & 1050857

IN THE SUPREME COURT OF ALABAMA

DAVID BARBER, in his capacity as
District Attorney of Jefferson County, Alabama,

Appellant,

v.

JEFFERSON COUNTY RACING ASSOCIATION, INC. d/b/a The
Birmingham Race Course; MIKE HALE; INNOVATIVE SWEEPSTAKES
SYSTEMS, INC.,

Appellees.

Appeal from the
Jefferson County Circuit Court
(Case No. CV-05-7684)

BRIEF OF AMICUS CURIAE GOVERNOR BOB RILEY
IN SUPPORT OF APPELLANT

Kenneth D. Wallis, II
Scott L. Rouse
Office of the Governor
State Capitol, Room N-104
600 Dexter Avenue
Montgomery, Alabama 36130
(334) 242-7120
ken.wallis@governor.alabama.gov
scott.rouse@governor.alabama.gov

Attorneys for Amicus Curiae
Governor Bob Riley

TABLE OF CONTENTS

Table of Authorities	ii
Summary of the Argument	1
Argument	3
I. The Sweepstakes Operation Represents A Direct Assault Upon The Stated Will Of The Citizens Of Alabama To Prohibit Lotteries.	3
II. This Appeal Presents A Test Case That Could Impact Other Attempts To Flaunt Similar Anti- Lottery Laws Across the Nation.	13
III. Proposed Legislation Does Not Affect This Court's Duty To Rule On This Case.	19
Conclusion	21
Certificate of Service	22

TABLE OF AUTHORITIES

Cases

<u>Alabama State Fed'n of Labor v. McAdory,</u> 246 Ala. 1, 18 So. 2d 810 (1944)	11
<u>Austin v. Alabama Check Cashers Ass'n,</u> --- So. 2d ---, 2005 WL 3082884 (Ala. 2005)	12
<u>Cohen v. Williams,</u> 294 Ala. 417, 318 So. 2d 279 (1975)	12
<u>Dreem Arts, Inc. v. City of Chicago,</u> 637 F. Supp. 53 (N.D. Ill. 1986)	10
<u>Ex parte Lacy,</u> 232 Ala. 525, 168 So. 554 (1936)	12
<u>Ex parte Ted's Games Enterprises,</u> 893 So. 2d 376 (Ala. 2004)	6, 12
<u>G.A. Carney, Ltd. v. Brzeczek,</u> 117 Ill. App. 3d 478, 453 N.E.2d 756, 72 Ill. Dec. 881 (1983)	10
<u>Greater New Orleans Broadcasting Ass'n v. United States,</u> 149 F.3d 334 (5th Cir. 1998)	5, 6
<u>Johnson v. State,</u> 83 Ala. 65, 3 So. 790 (1888)	5
<u>Jones v. State,</u> 56 Ala. App. 280, 321 So. 2d 247 (Ala. Crim. App. 1975)	6, 7
<u>Monroe v. Harco, Inc.,</u> 762 So. 2d 828 (Ala. 2000)	11
<u>Opinion of the Justices No. 83,</u> 249 Ala. 516, 31 So. 2d 753 (1947)	6
<u>Opinion of the Justices No. 277,</u> 397 So. 2d 546 (Ala. 1981)	10

<u>Opinion of the Justices No. 373,</u> 795 So. 2d 630 (Ala. 2001)	5, 9, 13
<u>Pepsi Cola Bottling Co. of Luverne, Inc. v. Coca-Cola</u> <u>Bottling Co.,</u> 534 So. 2d 295 (Ala. 1988)	8
<u>Try-Me Bottling Co. v. State,</u> 235 Ala. 207, 178 So. 231 (1938)	4

Statutes and Constitutional Provisions

Art. IV, § 26, Ala. Const. (1875)	4, 5
Art. IV, § 65, Ala. Const. (1901)	passim
Ala. Code § 13A-12-20(6) (1975)	4
Ala. Code § 13A-12-22 (1975)	4
Ala. Code § 8-19D-1(4) (1975)	8

Other Authorities

54 C.J.S. <u>Lotteries</u> § 8 (2005)	8
"Busted Business Owner Speaks Exclusively To WAAY 31," Station WAAY-31 News Story, April 27, 2006 (Huntsville, Alabama)	18
"Court ruling opens door for BGI's Alabama expansion," Austin Business Journal (May 25, 2006)	17
"Internet sweepstakes may come to Arizona," Station KVOA News Story, April 25, 2005 (Tucson, Arizona)	16
Andrew Shain & Deborah Hirsch, "464 gaming machines seized in S.C.," The Charlotte Observer, March 3, 2006	14
Brendan Burke, "A new game in town," Casper Star-Tribune (Casper, Wyoming) March 25, 2005	15
Jimmy Simms, "Officials: Problem not prevalent in county," Cullman Times (May 23, 2006)	17

Op. S.C. Att'y Gen., 2001 WL 129355 (Jan. 8, 2001) 19

Summary of the Argument

The citizens of Alabama have, as reflected in their Constitution and statutes, prohibited lotteries and any scheme "in the nature of a lottery" for over 125 years. Art. IV, § 65, Ala. Const. 1901. The public policy against lotteries could not be more clearly and unequivocally expressed. The overwhelming evidence indicates that the sweepstakes operation at the Birmingham Race Course is a prohibited scheme in the nature of a lottery -- a de facto lottery established to evade the law that even the trial court recognized was a "sham."

The trial court's ruling improperly allows that evasion to succeed through an exceedingly narrow holding concerning the element of "consideration." If affirmed, this holding will severely undermine the ability of Alabama's citizens to prohibit lotteries in the future, and will fly in the face of the evidence in this case, which overwhelmingly indicates that it is sweepstakes entries, and not Internet time, that is being purchased.

This appeal presents this Court with the first opportunity of any State's supreme court to rule on the legality of an "Internet café/sweepstakes" scheme. Such

schemes are appearing all across the country in an apparent concerted effort to evade the anti-lottery laws of the various states. Alabama's courts -- including this Court -- must uphold Alabama's strong prohibitions on lotteries.

Furthermore, to the extent that the Appellees argue that that this appeal should be dismissed because certain anti-gambling legislation has been proposed to the Legislature, that suggestion must be rejected. This Court has a duty to decide cases and controversies that are properly presented before it, such as this appeal.

Argument

Governor Bob Riley respectfully submits this brief as an amicus curiae in support of Appellant. Governor Riley adopts the statement of facts contained in the Appellants' Brief, and Governor Riley also agrees with the substantive arguments made by Appellant. Rather than repeat what the Appellant has already argued, Governor Riley submits these additional points for the Court's consideration.

I. The Sweepstakes Operation Represents A Direct Assault Upon The Stated Will Of The Citizens Of Alabama To Prohibit Lotteries.

The citizens of Alabama have for over a century clearly set forth in their Constitution and statutes an unequivocal prohibition against every form of lottery. The trial court's ruling upholding the Appellees' sweepstakes operation undermines the ability of Alabama's citizens to govern themselves through this clear prohibition. If the sweepstakes operation is not a prohibited "scheme in the nature of a lottery," Art. IV, § 65, Ala. Const. 1901, then no operation is. If the trial court's ruling is affirmed, then Alabama's longstanding prohibition against lotteries, reflecting the will of the citizenry to protect against

social, moral and economic decay that follows such gambling operations, will be rendered virtually useless.

"In this State ... the public policy is emphatically declared against lotteries, or any scheme in the nature of a lottery, both by Constitution and by statutes." Try-Me Bottling Co. v. State, 235 Ala. 207, 212, 178 So. 231, 234 (1938); see Art. IV, § 65, Ala. Const. 1901¹; Ala. Code § 13A-12-20(6) (1975) (defining lotteries), Ala. Code § 13A-12-22 (1975) (prohibiting lotteries). Alabama's abhorrence against lotteries is a deeply-ingrained component of the State's moral conscience, existing in written form in the people's Constitution for over 125 years and remaining resolute today.² See Art. IV, § 26, Ala.

¹ Section 65 provides: "The legislature shall have no power to authorize lotteries or gift enterprises for any purposes, and shall pass laws to prohibit the sale in this state of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; and all acts, or parts of acts heretofore passed by the legislature of this state, authorizing a lottery or lotteries, and all acts amendatory thereof, or supplemental thereto, are hereby avoided."

² As evidence of the continuing resolve of Alabama's citizens against lotteries, one need look no further than to the events of 1999, when those citizens convincingly defeated a massive, well-funded effort to amend the Constitution to allow a State-sponsored lottery.

Const. 1875 (adopted verbatim in Art. IV, § 65, Ala. Const. 1901).

This abhorrence has stemmed from a recognition of the many social, moral and economic problems that often attend such games of chance. Opinion of the Justices No. 373, 795 So. 2d 630, 634 (Ala. 2001) (discussing the "general public conviction that lotteries are to be regarded ... as among the most dangerous and prolific sources of human misery" that led to Alabama's constitutional prohibition); see also Johnson v. State, 83 Ala. 65, 67, 3 So. 790, 791 (1888) (discussing "the policy of the constitution and laws of Alabama prohibitory of the vicious system of lottery schemes and the evil practice of gaming, in all their protean shapes, tending, as centuries of human experience now fully attest, to mendicancy and idleness on the one hand, and moral profligacy and debauchery on the other," and stating that "[n]o state has more steadfastly emphasized its disapprobation of all these gambling devices of money-making by resort to schemes of chance than Alabama") (emphasis added). These problems have a particularly devastating impact on children. See, e.g., Greater New Orleans Broadcasting Ass'n v. United States,

149 F.3d 334, 338 n.10 (5th Cir. 1998) ("Studies ... suggest that children of compulsive gamblers perform worse academically, are more likely to become alcoholics, develop gambling problems themselves, develop eating disorders, experience periods of depression, and attempt suicide. One observer concluded that in some respects, the harm a compulsive gambler inflicts upon his children and his family is really much greater than an alcoholic or drug addict.") (citations omitted), rev'd on other grounds, 527 U.S. 173 (1999).

Alabama's prohibition on any schemes "in the nature of a lottery" cannot, of course, mean that operations that are not actually lotteries are prohibited. Instead, it means that Alabama broadly prohibits both operations that self-consciously call themselves "lotteries" and operations that are in fact lotteries, although they may be masked as something else. See Opinion of the Justices No. 83, 249 Ala. 516, 518, 31 So. 2d 753, 755 (1947) ("The very purpose of this broad declaration [against lotteries] was to put a ban on any effort at evasion or subterfuge.") (quoted in Ex parte Ted's Games Enterprises, 893 So. 2d 376, 380 (Ala. 2004)); cf. Jones v. State, 56 Ala. App. 280, 285, 321 So.

2d 247, 251 (Ala. Crim. App. 1975) ("It is common knowledge that the gambling evil is often carried on in devious channels.").

One might search in vain before finding a more obvious "masked lottery" as the sweepstakes operation at issue here. The trial court implicitly acknowledged this in its order, expressly describing the operation as a "sham" that has the appearance of a lottery and is devised to attract customers to gamble, not to surf the Internet. C. 2007. Indeed, the court even acknowledged perhaps the best evidence of the true nature of the operation: the operations' own advertisements, which emphatically advertise the "sweepstakes," not the Internet café. See, e.g., Def. Ex. 15 (stating, without mentioning the Internet café: "IT'\$ HERE! QUINCY'S \$WEEPSTAKE\$ New at The Birmingham Race Course"). In fact, the operation was actually advertised as an alternative to known gambling casinos, without any mention of the Internet "product" purportedly for sale. C. 2007; see Def. Ex. 15B (showing a billboard stating: "Why Go To Greenetrack [casino]? WGTG \$weepstakes Here Dec. 15" -- with no mention of the Internet café). The only reasonable conclusion is that the actual, primary

"product" being sold is the chance to win a prize, not Internet time. See 54 C.J.S. Lotteries § 8 (2005) ("A controlling factor in the determination of whether a given scheme or business is a lottery is the nature of the appeal which the business makes to secure the patronage of its customers. If the controlling inducement is the lure of an uncertain prize, then the business is a lottery.") (footnote omitted).

The three elements of a lottery are present: "(1) a prize, (2) awarded by chance, and (3) for a consideration." Pepsi Cola Bottling Co. of Luverne, Inc. v. Coca-Cola Bottling Co., 534 So. 2d 295, 296 (Ala. 1988). However, while two of the three elements -- prize and chance -- were undisputedly present, the court erroneously and unnecessarily adopted an overly narrow approach to examining the third element, "consideration." Under the trial court's approach, consideration is lacking -- and therefore the operation is a "sweepstakes"³ and not a lottery -- as long as there is any way to acquire even a

³ Ala. Code § 8-19D-1(4) (1975) defines a "sweepstakes" as: "A legal contest or game where anything of value is distributed by lot or chance." In other words, a sweepstakes is a lottery without the element of consideration.

single free entry, no matter how unreasonable and onerous the requirements and regardless of whether that "free entry" is comparable to the number of entries or odds of winning that one would receive with a purchase. Such an extreme view of consideration is not required by any Alabama case law and is clearly not compatible with Alabama's "explicit condemn[ation] of 'any scheme' containing elements that would make the scheme resemble a lottery." See Opinion of the Justices No. 373, 795 So. 2d at 640.

Under the trial court's narrow analysis, for example, an operation would not involve consideration (and, thus, would not be a lottery) if it offered a free entry to persons who walked from Alabama to Alaska and back as a prerequisite. Such absurd results are inevitable under a strict "any-free-entry-equals-no-consideration" analysis, and gives those desiring to establish "masked lotteries" the very tool they need to undermine Alabama's lottery prohibition altogether by simply establishing unreasonable and illusory methods to obtain "free entries."

Instead, consistent with this Court's precedent, consideration should be analyzed more comprehensively,

examining all of the surrounding facts, circumstances and transactions in order to determine whether it is actually the sweepstakes or the "product" (here, supposedly Internet time) that is being purchased. See Opinion of the Justices No. 277, 397 So. 2d 546, 547 (Ala. 1981) (analysis of whether a scheme is a lottery is to focus on "the substance and not the semblance of things, so as to prevent evasions of the law"). Under this more reasonable analysis, the possibility of acquiring a free entry weighs against a finding of consideration, but that finding can be tempered and overcome by other circumstances showing the free entry route to be illusory, or by other evidence that the true products being purchased are entries for the chances to win prizes. See, e.g., Dreem Arts, Inc. v. City of Chicago, 637 F. Supp. 53, 56 (N.D. Ill. 1986) (finding "free entry" route illusory "because the obstacles to obtaining one are formidable" and because "it appears that plaintiffs have purposely made it more difficult to obtain free entry forms than to pay the \$2.00 news stand price of Nightmoves [containing an entry form]."); G.A. Carney, Ltd. v. Brzeczek, 117 Ill. App. 3d 478, 484-85, 453 N.E.2d 756, 761, 72 Ill. Dec. 881, 886 (1983) (finding "free entry"

route illusory based on all the facts and circumstances). Here, although free entries to the sweepstakes operation are technically available, the offer is unreasonable and illusory for all of the reasons set forth in Appellant David Barber's brief. All of the evidence in this case overwhelmingly indicates that it is sweepstakes entries that are primarily being purchased, not time on the Internet.⁴

It is clear that the sweepstakes operation is a masked lottery, a sham, a transparent attempt at "evasion or subterfuge." If Alabama's prohibition cannot reach even this poorly masked lottery operation, then no operation could possibly be prohibited as a "scheme in the nature of a lottery." Such a result would totally frustrate the

⁴ Interpreting the "consideration" element in the trial court's unreasonable fashion would clearly render Alabama's anti-lottery statutes in conflict with Art. IV, § 65 of the Alabama Constitution. Such an interpretation must be rejected. See Monroe v. Harco, Inc., 762 So. 2d 828, 831 (Ala. 2000) (stating that "[w]here the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other would be valid, the courts should adopt the construction [that] would uphold it.") (quoting Alabama State Fed'n of Labor v. McAdory, 246 Ala. 1, 10, 18 So. 2d 810, 815 (1944)).

express, longstanding will of the citizens of Alabama.⁵ The trial court utterly ignored the critically important language of the Alabama Constitution and applicable statutes in reaching its decision.

⁵ The trial court's suggestion that it would have been "the height of judicial activism" to rule that the sweepstakes operation is illegal cannot be taken seriously. C. 2007-08. Applying the State's anti-lottery and anti-gambling laws to a new effort at evasion is not "activism," but a necessary component of interpretation. This Court has regularly had to apply the State's gambling laws to evolving fact patterns. See, e.g., Ex parte Ted's Game Enters., 893 So. 2d 376 (Ala. 2004).

Also, this Court frequently examines, in various contexts, substance over form to determine whether a particular scheme is established to utilize legal technicalities to evade the law, and this sort of judicial analysis is not "activism." See Austin v. Alabama Check Cashers Ass'n, --- So. 2d ---, 2005 WL 3082884, at *16 (Ala. 2005) (stating that courts look to substance rather than form to determine whether lenders are evading the usury statutes: "No case is to be judged by what the parties appear to be or represent themselves to be doing, but by the transaction as disclosed by the whole evidence"); Cohen v. Williams, 294 Ala. 417, 420-21, 318 So. 2d 279, 281-82 (1975) (examining substance over form to determine whether "the corporate form is being used to evade personal responsibility"); Ex parte Lacy, 232 Ala. 525, 529, 168 So. 554, 557 (1936) (examining "the substance rather than the form of a transaction in determining whether the statute forbidding the wife from becoming surety for the husband has been violated").

II. This Appeal Presents A Test Case That Could Impact Other Attempts To Flaunt Similar Anti-Lottery Laws Across the Nation.

This appeal represents the first opportunity for a State's highest court to address an "Internet café/sweepstakes" scheme such as the one at issue here. The scheme operated at the Birmingham Race Course is just the latest attempt by pro-gambling forces to evade similar anti-lottery laws of the various States⁶ by masking lotteries as sweepstakes through the use of Internet technology. This appeal therefore presents a true national test case. Given Alabama's strong prohibitions on lotteries, both express and de facto, Alabama courts should provide no fertile ground for any continuing, nationwide development of these schemes.

A cursory Internet search reveals numerous news articles describing how similar "Internet café/sweepstakes" operations are appearing across the country in attempts to evade the anti-gambling laws of various states. The harmony between these efforts, including the use of the very same arguments and defenses (such as the continual but wholly

⁶ Alabama's "three-pronged definition of 'lottery' ... is still accepted by the overwhelming majority of jurisdictions, as well as the United States Supreme Court." Opinion of the Justices No. 373, 795 So. 2d at 635.

misplaced comparisons to McDonald's or Pepsi's sweepstakes), is revealing, as are the obvious detrimental effects of these operations. Some examples:

- 1) Andrew Shain & Deborah Hirsch, "464 gaming machines seized in S.C.," The Charlotte Observer, March 3, 2006⁷:

Drawing attention were an **increasing number of "Internet cafes"** where customers played video slots with prepaid cards. Business owners defended them as legal sweepstakes. Authorities, however, said the cafes, which pay out money to winners, are thinly veiled attempts to get around state gambling laws.

The burgeoning cafes appeared poised to become another wave of gaming similar to video-poker parlors that sprouted in border towns in the 1990s, authorities said.

....

"As time goes on we can foresee the problem growing greater and greater as it did in 2000 when people were losing their cars and their homes," York County Sheriff Bruce Bryant said. "It's obvious that we're headed back in that direction. We want to sort of nip it before it gets out of hand."

Business owners said their games, which are **growing nationwide**, were no different than sweepstakes offered at fast-food restaurants or Internet gambling available on home computers.

....

⁷ <<http://www.centredaily.com/mld/observer/14005624.htm>>

Internet sweepstakes cafes have made the biggest inroads in Alabama, where a state court ruled them legal after a series of raids. Internet cafes with sweepstakes games are also in Massachusetts, Texas and Florida

(Emphasis added);

2) Brendan Burke, "A new game in town," Casper Star-Tribune

(Casper, Wyoming) March 25, 2005⁸:

A former Casper electronic bingo hall has reopened as the Internet Cafe, which offers sweepstakes instead of gambling.

The EIP sweepstakes is just as legal as the twist-off sweepstakes people play when they buy a specially marked bottle of Pepsi, [said an employee of the Internet café].

....

A customer at the Internet Cafe can buy a phone card/Internet card good for one hour and 40 minutes of long-distance phone time or one hour of Internet access at the cafe for \$5. With every \$5 phone card/Internet card purchase, the customer is awarded 100 entries into the EIP sweepstakes.

....

The sweepstakes entries, whether acquired via mail or by purchasing a phone card, can be used to play slot-machine-style video games on the Internet Cafe's numerous computer terminals.

....

⁸ <<http://www.casperstartribune.net/articles/2005/03/25/news/casper/992e6b1a196a9a4987256fce006e3bde.txt>>.

The sweepstakes games at the Internet Cafe are programmed to pay out at a **92 percent return rate**, Consterdine said. In other words, for every 100 sweepstakes entries bet, a player will win 92 win points.

....

The game is also played in 15 other states including California, Hawaii and Florida....

(Emphasis added);

3) "Internet sweepstakes may come to Arizona," Station KVOA

News Story, April 25, 2005 (Tuscon, Arizona)⁹:

D.R. "Doc" Carson made his way to the Internet Cafe **every morning** and pulled up a chair in front of a terminal.

He skipped the keyboard, choosing instead to use the touch-screen monitor. **He usually stayed until around 5 p.m.**, when his wife gets home.

That's a long time on the Internet for a 62-year-old man who describes himself as computer illiterate. **But Carson wasn't surfing - he was playing the sweepstakes.**

Carson and dozens of others have bought long-distance phone cards that are **loaded with sweepstakes points used to play casino-type games** - and win cash - on the Internet Cafe's computers.

Operators say it's a legitimate business promotion plan, **no different from instant-win twist-off caps on a soda pop bottle.** However, authorities claim it is gambling, and therefore illegal.

⁹ <<http://www.kvoa.com/Global/story.asp?S=3255587>>

The games are the latest frontier in the battle over what constitutes illegal gaming. Sweepstakes also are played in Alabama, California, Florida, Hawaii, Massachusetts, South Carolina and Texas. Arizona and Utah are on the list for expansion.

....

"Are we skirting the line? Probably, a little bit. We're getting close," [the distributor of the games] said. "At the same time, we know that sweepstakes work. **If McDonald's didn't have their Monopoly game**, if it didn't work to boost their sales, they wouldn't keep doing it over and over and over."

....

... Carson ... said he has been to the cafe every day since it opened last month....

(Emphasis added).

These kinds of operations continue to arise within Alabama as well, some even as a direct result of the trial court's ruling in this case. See "Court ruling opens door for BGI's Alabama expansion," Austin Business Journal (May 25, 2006) ("The recent [Alabama circuit] court ruling has presented a great opportunity for BGI to place a large number of sweepstakes machines in [Alabama],' says Bill Schwartz, CEO of BGI.")¹⁰; Jimmy Simms, "Officials: Problem not prevalent in county," Cullman Times (May 23, 2006)

¹⁰ <<http://austin.bizjournals.com/austin/stories/2006/05/22/daily31.html>>

(noting a concern by at least one lawmaker that this case "could set a precedent allowing [casino-style] games in Cullman County")¹¹; "Busted Business Owner Speaks Exclusively To WAAY 31," Station WAAY-31 News Story, April 27, 2006 (Huntsville, Alabama) (discussing raid on Colbert County "telephone sweepstakes" establishment).¹²

Indeed, it should be no surprise that these and other accounts should sound so similar to each other and to this case. As the South Carolina Attorney General put it in a similar context, the gambling industry has made every effort to set up operations that appear to be like a McDonald's or Pepsi's sweepstakes, all the while maintaining the substance of a lottery:

With respect to the element of consideration, the [entity setting up the "sweepstakes"] will undoubtedly argue that such element is lacking because the customer is, in reality, purchasing Internet time and that the [gambling] game is merely a promotional device for the sale of a legitimate product. **The video gambling industry has been perfecting this argument for some time. The industry's dream is to disguise itself as a legitimate business which is simply promoting a legitimate product.** But concocting a scheme of selling time on the Internet does not make video gambling the same as McDonalds hamburgers.

¹¹ <http://www.cullmantimes.com/morelocal/local_story_143230321.html?keyword=secondarystory>

¹² <<http://www.waaytv.com/cgi-bin/shownews.cgi?id=2300>>

....

To try and conceal the gambling behind the facade of purchase of Internet time is thus nothing more than legal trickery. **Clearly, the lure ... is not Internet time, but the [gambling] game.**

Op. S.C. Att'y Gen. (Jan. 8, 2001), 2001 WL 129355, at *2 (emphasis added).

As no other State supreme court has passed on the legality of these new and expanding "Internet café/sweepstakes" schemes, this Court's decision looks to have nationwide import. Fortunately, under Alabama law, this Court's analysis is straightforward. Under any reasonable examination, the sweepstakes operation is an illegal lottery.

III. Proposed Legislation Does Not Affect This Court's Duty To Rule On This Case.

This Court has a duty to decide cases and controversies that are properly presented before it. This appeal is clearly one of those cases, involving the application of Alabama's strong gambling prohibitions to particular facts, something that this Court has done in the past and is clearly empowered and competent to do again. However, in a filing before this Court, Appellees actually suggested that this appeal should be dismissed because certain anti-

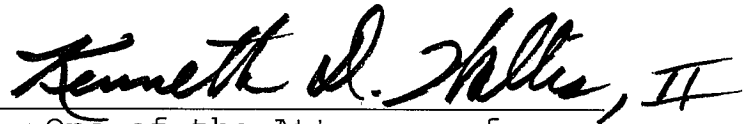
gambling legislation had been proposed in the Legislature. See Appellee's Feb. 22, 2006, Motion to Dismiss Appeal at 11-12. Such a suggestion clearly misconstrues the nature and work of an appellate court and should be rejected.

As this Court's history makes clear, just as it does not decide cases based upon the changing tide of public opinion nor upon any particular political winds, this Court does not evade decision-making in important or controversial cases by waiting and hoping that the other branches of government will moot the case. This Court does not dismiss appeals clearly presented and within its jurisdiction in light of some proposed legislation that may never become law. This case is clearly not moot and is under no foreseeable danger of becoming moot.

It is exclusively the province and duty of the courts, and ultimately this Court, to determine what the existing statutes and constitutional provisions of the State of Alabama mean. Although the trial court shirked that responsibility in significant measure, this Court should not. This Court should hear this appeal, and in light of the extreme public importance of the issues presented, should rule expeditiously in favor of the Appellant.

Conclusion

Based on the foregoing, the trial court's judgment is due to be reversed.



One of the Attorneys for
Amicus Curiae
Governor Bob Riley

OF COUNSEL

Kenneth D. Wallis (WAL064)
Scott L. Rouse (ROU010)
Office of the Governor
State Capitol, Room N-104
600 Dexter Avenue
Montgomery, Alabama 36130
(334) 242-7120
ken.wallis@governor.alabama.gov
scott.rouse@governor.alabama.gov

CERTIFICATE OF SERVICE

I hereby certify I have this day served a copy of the above and foregoing document on all counsel of record by placing a true and correct copy of same in the United States Mail, proper postage affixed thereto, and addressed as follows:

Charlie D. Waldrep
Waldrep, Stewart & Kendrick, LLC
2101 North Sixth Avenue, Suite 700
Birmingham, Alabama 35203

J. Mark White
Augusta S. Dowd
White, Arnold, Andrews & Dowd, PC
600 Massey Building
2025 North Third Avenue
Birmingham, Alabama 35203

Alan T. Rogers
H. Hampton Boles
Will Hill Tankersley
Bingham D. Edwards, Jr.
J. Eric Getty
Balch & Bingham, LLP
Post Office Box 306
Birmingham, Alabama 35201-0306

William M. Slaughter
J. Michael Rediker
Michael K. Choy
Charles M. Elmer
J. Vincent Graffeo
Haskell Slaughter Young & Rediker, LLC
1400 Park Place Tower
2001 Park Place North
Birmingham, Alabama 35203

John Bolton
Sasser, Bolton, Stidham & Sefton, P.C.
Post Office Drawer 4539
Montgomery, Alabama 36103-4539

G. David Johnston
Johnston Hinesley Flowers & Clenney, P.C.
291 North Oates Street
Dothan, Alabama 36303

William J. Baxley
Baxley, Dillard, Dauphin, McKnight & Barclift
2008 Third Avenue South
Birmingham, AL 35233

Troy R. King
Office of the Attorney General
Alabama State House
11 South Union Street, Third Floor
Montgomery, AL 36130-0152

Matthew H. Lembke
Michael R. Pennington
Marc James Ayers
Bradley Arant Rose & White LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203

This the 1st day of June, 2006.


OF COUNSEL